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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

NO. 77-751

GABRIEL HAGENDORFER,

PETITIONER

VS.

STATE OF ALABAMA,

RESPONDENT

BRIEF AND ARGUMENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE

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OPINIONS BELOW

The only written opinion rendered in this case was by the Alabama Court of Criminal Appeals, said opinion being reported in _____ Ala. _____, 348 So. 2d 1097 (1977).

Petition for Writ of Certiorari to the Alabama Supreme Court was denied without an opinion, said order being reported in _____ Ala. _____, 348 So. 2d 1101 (1977).

JURISDICTION

Petitioner applies for this Writ of Certiorari pursuant to the provisions of 28 U.S.C. §1257 (3).

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the Constitution of the United States, which provides in pertinent part:

> "No state shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

Respondent adopts as substantially true and correct the Statement of the Case contained in Petitioner's Writ of Certiorari.

QUESTIONS PRESENTED

1. Does the Supreme Court of the United States have jurisdiction to review the constitutionality of a state statute (a) when the Petitioner failed to comply with state procedural law by raising this issue in the trial court, and (b) where the statute was followed at the Petitioner's trial, so that the Petitioner was in no way harmed by the operation of the statute?

2. Is a variance so material as to violate due process of law where the indictment names one vendee in a single sale of marjuana and the proof at trial shows that there were two vendees, and where the Petitioner was not misled by the indictment?

3. Does the Petitioner have standing to challenge the constitutionality of a state court decision where there is no case or controversy presented thereunder?

REASONS FOR DENYING THE WRIT

I. THE PETITIONER IS NOT ENTITLED TO CHALLENGE THE CONSTITUTIONALITY OF TITLE 30, SECTION 97(1), CODE OF ALABAMA 1940, BECAUSE THE STATUTE WAS FOLLOWED AT TRIAL.

The Petitioner claims that he was denied equal protection and due process of the law because he was deprived at trial of the protections of Title 30, Section 97(1), while persons in counties of greater than 140,000 population received these protections. This argument fails because the statute was followed in the Petitioner's trial. Even if the statute had applied in the county where he was convicted, the Petitioner would not have received any additional benefits thereunder because the terms of the statute were not violated at his trial.

Title 30, Section 97(1) reads, in part:

> "It shall be improper for the trial court to ask the accused, counsel for the accused, or the prosecuting attorney in the hearing of the jury whether or not he or they will consent to a separation of the jury pending the trial. It shall be improper for the accused or counsel for the accused, or the prosecuting attorney to state to the trial court in the hearing of the jury that he or they consent to a separation of the jury pending the trial.

The statute only requires (1) that the judge not ask, within the hearing of the jury, whether either of the par-

ties will consent to a separation, and (2) that neither the defendant nor the prosecuting attorney state, within the hearing of the jury, that he will consent to a separation. The purpose and intent of this provision, as construed by the Alabama Supreme Court, is twofold: (1) to prevent a defendant from being prejudiced by the jurys' knowledge that he has refused to consent to their separation and (2) to prevent the jury from showing undue favoritism to a defendant by reason of knowledge that he has consented to their separation. *Kennedy v. State*, 291 Ala. 62, 277 So.2d 878 (1973).

The requirements of the statute were met in the instant case. Neither of the parties either consented or refused to consent to a separation in the presence of the jury. There was nothing said which would have prejudiced the jury against the defendant. The prosecuting attorney merely asked the trial judge, "Are you going to keep them together?," as the jury recessed for lunch, to which the judge replied, "No, sir. I have already discussed that with both of them. . . ." Certainly, if this exchange had had any effect on the jurors, the effect would have been favorable toward the Petitioner because he consented to the separation. In fact, it might seem as though the prosecutor suggested that the jury be kept together but the defendant permitted them to separate for lunch.

In any event, there was no indication in the record, nor was there any showing on appeal, that the jury even heard or understood this exchange. The statute explicitly requires that the statement be made in the hearing of the jury in order for impropriety to result. The Supreme Court of Alabama acknowledged this requirement in *Kennedy v. State*, 291 Ala. 62, 277 So.2d 878 (1932), where a defendant claimed that Title 30, Section 97(1) had been violated because he

signed a separation agreement in the presence of the jury. The Court rejected this argument, stating:

> "We have searched the record carefully and can find no evidence that the jury *heard* anything to indicate whether the defendant agreed or refused to agree to their separation."

This case indicates that the burden is on the defendant to prove that the jurors heard the statement and were prejudiced thereby. There has been no showing by the Petitioner in this case that the jury members heard the prosecutor's question or that they were in any manner prejudiced by it.

II.

THE PETITIONER WAIVED ANY POSSIBILE RIGHT TO CHALLENGE THE CONSTITUTIONALITY OF TITLE 30, SECTION 97(1) BY HIS FAILURE TO OBJECT AT TRIAL TO ALLEGED VIOLATIONS OF THE STATUTE.

The Alabama Court of Criminal Appeals, in dealing with the Petitioner's contention that Title 30, Section 97(1), Code of Alabama 1940, violates the Fourteenth Amendment to the Constitution of the United States, found that it could not consider this question because it was not raised in the trial court. Specifically, the Petitioner did not make any objection when the prosecuting attorney asked the trial judge, "Are you going to keep them [the jury] together?", nor did the petitioner file any motion with regard to the above-comment. Thus, the Court of Criminal Appeals had nothing to review.

The Court never reached the issue of whether this statement was a violation of Title 30, Section 97(1), or of whether the protections of that statute would be extended to the Petitioner, but found that the Petitioner waived his right to assert the alleged unconstitutionality on appeal because he failed to object to the statement at trial.

This result is in keeping with other Alabama cases which follow the rule that, generally, improper conduct on the part of a prosecutor is not subject to review unless there is a prompt, specific and appropriate objection by the opposing counsel and a ruling by the trial court on the objection. *Heard v. State,* 335 So.2d 679 (1976); *Anderson v. State,* 209 Ala. 36, 95 So. 171 (1923); *Espey v. State,* 270 Ala. 669, 120 So.2d 904 (1960).

The Court of Criminal Appeals had an adequate and independent procedural ground upon which to base its decision without ever reaching the question of the constitutionality of the statute. The Court did note that the Supreme Court of Alabama had upheld the constitutionality of the statute in *Young v. State,* 283 Ala. 682, 220 So.2d 848 (1969) but the Court did not base its ruling on that ground in the instant case.

Because the state appellate court ruled on an independent procedural ground rather than on the constitutional issue, this Honorable Court should decline to review the case. In the 1965 case of *Henry v. Mississippi,* 379 U.S. 443, 13 L.Ed.2d 408, 85 S.Ct. 564, reh. den. 380 U.S. 926, 13 L.Ed.2d 813, 85 S.Ct. 878 (1965), the United States Supreme Court held that it would decline to review state court judgments which rest on independent and adequate state substantive or procedural grounds, even where those judgments also decide

federal questions. The Court qualified this principle by adding that a litigant's procedural defaults in state proceedings would not prevent the Court from reviewing the case where the State's insistence on compliance with its procedural rule did not serve a legitimate state interest.

In the instant case, the State of Alabama clearly has a legitimate interest in requiring that the defendant in a criminal trial make the judge aware of his contention that a statement made by the prosecutor was prejudicial, either by timely objection or by a motion for mistrial or new trial. Otherwise, the trial judge has no opportunity to determine whether an error has occurred or to attempt to correct the error if one has been made.

In an Alabama case with facts similar to the case at bar, *Kenny v. State,* 51 Ala. App. 35, 282 So.2d 387 (1973), where the prosecuting attorney asked the trial judge in the presence of the jury, "Have we had some stipulation on separation?", the Alabama Court of Criminal Appeals affirmed the case stating:

> "We think that the failure of defense counsel to object or ask for a mistrial precludes our finding error in the Assistant District Attorney's using the word "separation" in the presence of the jury."
>
> ". . . Since the point was neither reserved by objection before the jury went to lunch nor by way of a ground in a motion for new trial, the State was given no opportunity in the trial court to exonerate itself from the pall cast by the separation."

Here, the Petitioner gave the trial judge no opportunity to rule on his objection or to determine whether the jury

had heard or had been prejudiced by the prosecutor's question. In light of his failure to properly raise his objection at trial, he should now be precluded from raising the objection on appeal to the United States Supreme Court.

III.

THE STATUTE IN QUESTION IS CONSTITUTIONAL.

For reasons already stated, this Honorable Court has sufficient grounds for denying certiorary without reaching the issue of whether Title 30, Section 97(1) is constitutional. However, should the Court consider this issue, it must reach the conclusion that the statute is valid.

The Petitioner contends that he, as well as all other felony defendants being tried before a jury, have the right to the protections provided in Title 30, Section 97(1), and that the placing of territorial limits on these rights by the Alabama Legislature is unconstitutional. Such is not the case. There is no constitutional guarantee that a defendant not be asked in the presence of the jury whether he consents to a separation. Prior to the passage of Title 30, Section 97(1), no criminal defendant was entitled to this benefit. This was simply a privilege bestowed by the Alabama Legislature within the limits it saw fit to set.

The Supreme Court of Alabama upheld the validity of Title 30, Section 97(1) in *Young v. State*, 283 Ala. 676, 220 So.2d 843 (1969), observing that the claim of discrimination based on population under this statute was not analogous to the reapportionment cases of *Baker v. Carr*, 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663, and *Reynolds v .Sims*, 337 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506, because in those cases

an important constitutional right, the right to vote, was involved. Here, the Court continued, no such constitutional right was in question, therefore the same standards did not apply. As the Court stated:

> That a presumptive, procedural right (presumption in favor of defendant that prejudice ensued where jury was allowed to separate during trial of case) not guaranteed by state or federal constitution, where granted to some, if not most, defendants in criminal cases, must be granted to all defendants similarly situated, or it is unconstitutional, is simply not the law. The legislature has plenary power, to pass any law on any subject it so desires except as restricted by the constitutional state or federal, Ex parte Foshee, 246 Ala. 604, 21 So.2d 827; Sec. 44, Constitution of Alabama 1901, and, when it deems necessary, can limit the application of a law to one or more political subdivisions within the state, and base such limited application upon any reasonable factor, such as population, it wishes, and unless there is a clear showing that the intended limited application is arbitrary, unreasonable and not made in good faith, it is good law and must be followed. Reynolds v. Collier, 204 Ala. 38, 85 So. 465; Thomas v. Fesguson, 267 Ala. 383, 102 So.2d 20.

The *Young* case, dealt with the first part of the statute, which provides that if the defendant and the prosecuting attorney both consent, in open court, to the separation of the jury, there shall be a presumption that the jury is not prejudiced by the separation. Because this section of the statute specifically calls for the consent to be made in open court in counties of greater than 140,000 population, the

Legislature obviously felt that it was necessary to add certain guidelines to be followed when obtaining the consent in those counties. These are reasonable guidelines which relate particularly to the first part of the statute and are therefore constitutionally valid.

Subsequent to the Alabama Supreme Court's decision in the *Young case*, supra, the same defendant, Cleophus Young, filed a habeas corpus petition in federal district court, again alleging the unconstitutionality of Title 30, Section 97(1). The petition was denied and he then appealed to the Fifth Circuit Court of Appeals. The Fifth Circuit affirmed the denial of the petition, stating that jury sequestration is not a fundamental or constitutionally guaranteed right, and, therefore, that in order to satisfy the requirements of the equal protection clause the state was required to show only that the distinction was reasonable and free from invidious discrimination. *Young v. State of Alabama*, 443 F.2d 854 (5th Cir. 1971). The Fifth Circuit found that the State of Alabama met this burden. Young then appealed to the United States Supreme Court, where certiorari was denied. *Cleophus Young v. Alabama*, 405 U.S. 976, 31 L.Ed.2d 251 92 S.Ct. 1202, (Mar. 6, 1972).

As in *Young*, supra, certiorari should again be denied because (1) the Petitioner waived any right to challenge its constitutionality by failing to comply with Alabama procedural law and raise this issue in the trial court, (2) the record clearly shows that the statute was followed and that the Petitioner was not harmed because the statute did not apply in his county, and (3) the Petitioner has failed to show that the statute is arbitrary, unreasonable, or not passed in good faith.

Finally, even assuming that this Honorable Court did

grant certiorari and did find that the statute was unconstitutional, such a finding would in no way benefit the Petitioner. The effect of such a ruling would be to invalidate the entire statute at the time of the Petitioner's trial and he would still not be eligible to receive any of the protections afforded by the statute.

It should be noted that in the new Code of Alabama 1975, which became effective on October 31, 1977, the distinction based on 140,000 population was deleted from Title 30, Section 97(1), so that the statute now applies in every county in Alabama. See *Code of Alabama 1975*, §12-16-9.. (Attached as Appendix A)

IV.

THERE WAS NO MATERIAL VARIANCE BETWEEN THE INDICTMENT AND THE PROOF AT TRIAL.

The Petitioner claims that he was denied due process of law in that there was a fatal variance between the indictment under which he was convicted and the proof at trial. The Petitioner claims that, while the indictment charged him with selling marijuana to one "William Womack," the proof at trial showed the actual vendee to be Deputy Roland Howell. This claim is totally without merit. The record reflects that the sale was made to both William Womack and Roland Howell. These two agents were working together as a team and they both participated in the buy. The evidence clearly shows that the Petitioner made the sale to both Womack and Howell in a single transaction: Agent Womack gave the following account of the transaction:

"A. Well, we both, Agent Howell and myself, got

out of the car and walked up to the driver's window. And he told us he had the stuff right there in the car, and asked how much we wanted. And we told him we would take three bags. And he took a plastic sandwich bag, commonly called a baggie, and filled up three bags out of a larger bag he had in the car.

"Q. And he delivered it to you at that time?

"A. Yes, sir." (R. 20)

On cross-examination, Agent Womack was questioned as follows:

"Q. Now, I want to ask you again for clarity: if I understood you correctly, you are telling this Jury that this Defendant sold the controlled substance to Mr. Howell, is that correct?

"A. Well, he actually sold it to both of us. Mr. Howell got two of the bags and I got one of the bags.

"Q. Did he hand you a bag and Howell two bags?

"A. Yes, sir." (R. 35)

Even the testimony of Gabriel Hagendorfer, by itself, would be sufficient to prove that he had sold marijuana to the two agents, Womack and Howell, as his following comments indicate:

"Mary said that there was some people waiting down the road that wanted to buy some grass from me. . . . (R. 109)

". . . I decided, 'Okay, I will go ahead and sell it to them.' (R. 110)

"I pulled up beside them — pulled over to their car. I said, 'Follow me.' And I took off . . . We made the transaction . . . (R. 110)

"They wanted to buy some more. They came back and approached me and wanted to buy some more marijuana." (R. 114-115)

Thus, Hagendorfer readily admitted that he sold the marijuana to both agents.

Further, the Petitioner admits in his brief in support of his Petition for Writ of Certiorari that the evidence at trial showed one joint transaction with both William Womack and Roland Howell as vendee. (Petitioner's Brief, pp. 42-43)

In accord with the evidence, the Alabama Court of Criminal Appeals rejected the Petitioner's claim of a fatal variance, finding that the proof at trial affirmatively established that both officers participated in the purchase from the Appellant and noting that each officer was handed at least one bag of marijuana at the time of the sale. (p. 9a of Petitioner's Brief)

The Petitioner in this case was charged in the indictment with selling marijuana to William Womack and was convicted for selling marijuana to William Womack. The mere fact that the proof at trial shows that another person was involved in the sale does not make the indictment invalid.

Both Alabama and federal cases hold that a variance is not fatal unless the indictment does not inform the defendant of the charges against him so that he can prepare his defense. Stated otherwise, for the variance to be material, it must be substantially misleading or injurious to the ac-

cused in his efforts to defend himself against the charge. See, e.g., *Blackmon v. State*, 46 Ala. App. 274, 240 So.2d 696, certiorari denied 286 Ala. 733, 240 So. 2d 699 (1970); *U.S. v. Freeman*, 514 F. 2d 1184 (C.A. Kan. 1975); *U.S. v. Quicksey*, 525 F. 2d 337 (C.A. W. Va. 1975); *Rathbun v. U.S.*, 236 F. 2d 514, (C.A. Colo. 1956) affirmed 78 S. Ct. 161, 355 U.S. 107, 2 L. Ed. 2d 134, rehearing denied 78 S. Ct. 363, 355 U.S. 925, 2 L. Ed 355.

These decisions are in accord with Rule 52(a) of the Federal Rules of Criminal Procedure, 18 U.S.C.A., which reads as follows:

> "(a) Harmless Error. Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded."

The record reflects no confusion by the Petitioner concerning the charges against him. In fact, he admits to selling marijuana to both men. (R. 110, 114-115) Further, he waived any objection he may have had by failing to demur to the indictment or raise its sufficiency at trial. *Sullivan v. State*, 38 Ala. App. 340, 83 So. 2d 259 (1959).

The Petitioner claims that the variance was fatal because it exposed him to the danger of a second trial for the sale of marijuana to Roland Howell. The Petitioner runs no such risk. The record bears out the fact that the sale to Womack and Howell was a single transaction, and the Court of Criminal Appeals makes this fact clear in its opinion, as follows:

> "We are of the opinion that this was one joint transaction, and the evidence was properly admitted as to the officers, Womack and Howell. *Morrow v. State*, 52 Ala. App. 145, 290 So. 2d 209, cert. denied

> 292 Ala. 743, 290 So. 2d 213, and authorities cited therein."

Any variance between the indictment and the proof at trial was not material in that the rights of the Petitioner to defend himself and to avoid the risk of double jeopardy were in no way prejudiced.

V.

THE PETITIONER HAS NO STANDING TO CHALLENGE THE CONSTITUTIONALITY OF *DUIN V. STATE*.

The Petitioner attempts to challenge the constitutionality of *Duin v. State*, 288 Ala. 329, 260 So. 2d 602 (1972), on the premise that *Duin*, supra, authorizes inspecific indictments. Presumably, the Petitioner objects to the restatement in *Duin* of existing law that if the allegations in the indictment substantially follow the language of the statute creating the offense, such indictment is valid. In *Duin*, supra, which was also a case arising under the Alabama Controlled Substances Act, Title 22, § 58 (47) Code of Alabama, Recompiled 1958, as amended, the Court held that the indictment charging the defendant with the sale of marijuana was sufficient, even though it did not name the vendee, because it was framed in the words of the statute. The Court noted that the defendant had neither filed a demurrer nor otherwise challenged the legal sufficiency of the indictment and stated that it would therefore refrain from determining what effect a demurrer raising the omission of the name of the vendee would have had. Similarly, the Petitioner here filed no demurrer to the indictment, therefore, the effect of the *Duin* precedent, if any, would be that in the absence of a demurrer, an indictment following the language of the statute is valid.

In any event, the above discussion is really academic because *Duin*, supra, is not applicable to this case. *Duin*, supra, involved an indictment where the vendee was not named. There is no controversy involving *Duin* in this caseo, because here the vendee was named in the indictment on which the Petitioner was tried. Here, the indictment included more than was required by the statute. As stated earlier, the Petitioner was indicted and convicted for selling marijuana to William Womack. He was aware of the crime for which he was being tried. The indictment is not invalid simply because an additional person was involved in the transaction.

Thus, in the present case we do not reach the question of the validity of the rule that an indictment is valid if it follows substantially the language of the statute creating the offense. Although the Alabama Uniform Controlled Substances Act does not require as an element of the crime of selling controlled substances that the vendee be identified, the vendee was identified and named in the indictment in this case.

CONCLUSION

The petition for writ of certiorari to the Supreme Court of Alabama should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Walter Turner, one of the attorneys for the respondent, and a member of the Bar of the Supreme Court of the United States, and I, Linda C. Breland, one of the attorneys for respondent, hereby certify that on this 22 day of December, 1977, we did serve the requisite number of copies of the foregoing Brief and Argument of Respondent and Appendix on the Honorable J. Michael Druhan, Jr., whose address is Post Office Box 154, Mobile, Alabama 36601, attorney for petitioners, by mailing said copies to him at the aforesaid address with the postage prepaid.

Walter Turner

WALTER TURNER
CHIEF ASSISTANT ATTORNEY
GENERAL OF ALABAMA

Linda C. Breland

LINDA C. BRELAND
ASSISTANT ATTORNEY GENERAL
OF ALABAMA

APPENDIX A

§ 12-16-9. Permitting separation of jury during trial upon consent of accused, prosecuting attorney, etc.; presumption as to separation of jury; questioning of or making of statement by accused, prosecuting attorney, etc., as to separation of jury in hearing the jury.—(a) If the accused and his counsel and also the prosecuting attorney, in any prosecution for felony, whether capital or non-capital, consent thereto in open court, the trial court in its discretion may permit the jury trying the case to separate during the pendency of the trial, whether the jury has retired or not. A separation so permitted shall not create a presumption of prejudice to that accused, but on the contrary it shall be prima facie presumed that the accused was not prejudiced by reason of the separation of the jury.

(b) It shall be improper for the trial court to ask the accused, counsel for the accused or the prosecuting attorney, in the hearing of the jury, whether he or they will consent to a separation of the jury pending the trial.

(c) It shall be improper for the accused, counsel for the accused or the prosecuting attorney to state to the trial court in the hearing of the jury that he or they consent to a separation of the jury pending the trial. (Acts 1943, No. 384, p. 358.)

APPENDIX B

Tit. 22, §258(47). Prohibited acts A; penalties.—(a) Except as authorized by this chapter, any person who possesses, sells, furnishes, gives away, obtains or attempts to obtain by fraud, deceit, misrepresentation or subterfuge or by the forgery or alteration of a prescription or written order or by the concealment of material fact or by use of false name or giving a false address controlled substances enumerated in schedules I, II, III, IV and V is guilty of a felony and, upon conviction, for the first offense may be imprisoned for not less than two nor more than fifteen years and, in addition, may be fined not more than $25,000.00; provided, that any person who possesses any marihuana for his personal use only is guilty of a misdemeanor and upon conviction for the offense, shall be imprisoned in the county jail for not more than one year, and in addition, shall be fined not more than $1,000.00; provided further, that the penalties for the subsequent offenses relating to possession of marijuana shall be the same as specified in the first sentence of this subsection.

(b) Any person who violates this section with respect to a counterfeit substance enumerated in schedules I through V is guilty of a felony and upon conviction, for the first offense may be imprisoned for not less than two nor more than fifteen years and may be fined not more than $25,000.00. (Act 1971, No. 1407, p. 2378, § 401.)